In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 448

ANDREW KYRIACO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a–19a) is reported at 425 F. 2d 1069. The opinion of the district court (Pet. App. 1a–15a) is reported at 300 F. Supp. 968.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1970 (Pet. App. 17a). The petition for a writ of certiorari was filed on July 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

033-783—70

QUESTION PRESENTED

Whether Section 7602 of the Internal Revenue Code, applied consistently with the Fourth Amendment, authorizes the use of an Internal Revenue summons in connection with an administrative investigation into the possibility of the existence of a prosecutable criminal case against a taxpayer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment and Section 7602 of the Internal Revenue Code of 1954 are set forth at pages 3–4 of the petition.

STATEMENT

The petitioners in this case are six corporations and certain of their officers. In 1967, Special Agent Regan of an Internal Revenue Service district Intelligence Division office received information of possible unreported income of Jordanos', Inc., one of the petitioners (Pet. App. 5a). At that time, the tax returns of Jordanos', Inc. for the years 1962–1965, inclusive, had been audited; its 1967 return was in the process of being audited by Revenue Agent Harris. After making some inquiries, Regan recommended that the completed audits be reopened (Pet. App. 4a–5a; II–R. 55, 254, 291–295).[1] His recommendation was followed, and

[1] "II–R." references are to the transcript in *United States v. M. P. Ruggeiro, et al.*, one of the six cases consolidated below. Following the court of appeals' decision in this case, Andrew Kyrinco, as Treasurer of Jordanos', Inc., was substituted as a party for Ruggeiro upon petitioners' motion to the court of appeals on the ground that Ruggeiro was no longer an officer of that corporation. When the government pointed out that the summonses, in addition to seeking corporate records, also sought the testimony of the named individuals, the substitution order was modified to retain Ruggeiro as a party.

the allegation of unreported income of Jordanos', Inc. was made the subject of a joint investigation by Special Agents Moriyama and Regan and Revenue Agent Davis (Pet. App. 5a–6a; II–R. 33, 292). Simultaneously, the same three agents were assigned to related investigations of the other five petitioner corporations (Pet. App. 5a). Internal Revenue summonses, signed by Special Agent Moriyama, were issued in due course to all of the petitioners, seeking the corporate records of the six corporations (Pet. App. 5a–6a). Upon the refusal of petitioners to comply with the summonses, six separate enforcement actions were initiated in the district court pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954.

In the district court proceedings, the Special Agents testified that the records sought were necessary to determine whether the corporations' tax returns were correct as filed; if upon completion of their investigation they should conclude that recommendations of criminal prosecutions were not warranted, they would make recommendations on the imposition of fraud penalties and stay with the investigation as long as necessary (II–R. 71–76, 86, 100, 254–257).

The district court enforced the summonses. While noting that in this case the tax liability of the petitioner corporations was to be determined as a "necessity to a prosecutable criminal case," the district court also pointed out that "a criminal investigation may—and most likely will—result in the imposition of civil tax liability including a 50% fraud penalty" (Pet. App. 13a). Relying on its earlier decision in *Hourfield*,

Inc. v. *United States*, 409 F. 2d 694, 697, to the effect that an Internal Revenue summons could properly be used as long as "no criminal case is actually pending against the taxpayer", the court of appeals affirmed (Pet. App. 16a–19a).

ARGUMENT

1. Although the statutory question presented here—whether an Internal Revenue summons can be used in connection with an administrative investigation into the possibility of a criminal tax prosecution—has been briefed and will be argued in *Donaldson* v. *United States*, No. 65, this Term, that is no reason for granting the present petition. The principal issue in *Donaldson*, and the one that induced the government to acquiesce in the granting of the writ there, relates to the circumstances under which a taxpayer may intervene to contest enforcement of a subpoena addressed to a third party. The "criminal purpose" issue will be reached in *Donaldson* only if that petitioner convinces this Court that the court of appeals erred in denying him intervention and, for the reasons given in our *Donaldson* brief, we believe he cannot do that.

The "criminal purpose" issue by itself does not warrant review in this Court. As petitioners acknowledge, there is no conflict among the decisions of the courts of appeals on this issue; the fact that different courts have used somewhat different rationales in upholding subpoenas creates no conflict warranting resolution here, and it will be time enough for this Court to consider the matter if a court of appeals decides in

a taxpayer's favor. Our *Donaldson* brief shows that the decisions in the lower courts are plainly correct. Indeed, since certiorari was granted in *Donaldson*, this Court has twice denied petitions for writs of certiorari seeking review of court of appeals decisions in the government's favor on the "criminal purpose" issue.[1] There is no more reason to grant this petition than those.

2. Nor does petitioners' Fourth Amendment argument—not presented in *Donaldson*—add anything to this case that warrants plenary review. The constitutional issue has been considered in the courts of appeals, and was expressly raised in the petition for a writ of certiorari that this Court denied in *Shlom* v. *United States*, *supra*, n. 2. Petitioners here simply raise again the "ghost of controversy long since settled adversely to their claim." *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 196. They fail to distinguish between the Fourth Amendment's reasonableness requirement—which we acknowledge applies, but is not transgressed by a subpoena lawful under the statute—and its warrant provisions—which do not apply to administrative examinations of books and records. *See* v. *City of Seattle*, 387 U.S. 541, 545, and *Camara* v. *Municipal Court*, 387 U.S. 523, 538–539, upon which petitioners rely, recognize the flexible application of the Fourth Amendment to administrative investigations, even where intrusion into private homes

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[1] *Giordano* v. *United States*, 419 F. 2d 564 (C.A. 8), certiorari denied, 397 U.S. 1037; *Shlom* v. *United States*, 420 F. 2d 263 (C.A. 2), certiorari denied, 397 U.S. 1074.

and places of business is involved. See also *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 77. Indeed, this Court has expressly held that probable cause need not be shown under the Internal Revenue subpoena statute even when the expiration of the statute of limitations requires that any subpoena be specifically based upon fraud. *United States* v. *Powell*, 379 U.S. 48.[1]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied. The Court may, however, wish to defer action on this petition until *Donaldson* v. *United States*, No. 65, this Term, is decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

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[1] Nor do the facts in this case add anything to those in *Donaldson*. The district court's findings about the agents' purposes (upon which petitioners place great emphasis) add nothing to—and in fact fall short of—the description of the functions of the different types of revenue agents set forth in our *Donaldson* brief, matters appropriate for judicial notice.

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